92-917

No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SPENCER GIFTS, INC.,
Petitioner,

v.

JOHN D. OLITSKY,
Respondent, Cross-Petitioner.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

HAL K. GILLESPIE
GILLESPIE, ROZEN & TANNER, P.C.
Brookriver Center, Suite N-703
8200 Brookriver Drive
Dallas, Texas 75247
(214) 634-0333
Attorneys for Respondent, Cross-Petitioner John D. Olitsky

November 25, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. When the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b), refers to doubling "amounts owing" in instances of willful age discrimination, and the court determines the plaintiff is entitled to an award of front pay, is the amount of front pay owing subject to doubling?

LIST OF PARTIES AND RULE 29.1 LIST

The caption lists the parties before the court of appeals and this Court. Spencer Gifts, Inc.'s parent company is MCA, Inc. Spencer Gifts, Inc.'s only non-wholly owned subsidiary is Matsushita Industrial Electrical Company, Ltd.

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CROSS-PETITION FOR WRIT OF CERTIORARI

Respondent, Cross-Petitioner John D. Olitsky prays for a writ of certiorari to review the Opinion and Order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on June 22, 1992.

OPINIONS BELOW

The court of appeals opinion is reported at 964 F.2d 1471 (5th Cir. 1992). The Fifth Circuit's order denying rehearing issued July 28, 1992 is attached to Spencer's Petition for Writ of Certiorari (Pet. App. at 33a-34a). The district court did not render a written opinion.

JURISDICTION

Cross-Petitioner John D. Olitsky expressly relies upon Rule 12.3, S.C.R., for this cross-petition, having received the Petition for Writ of Certiorari on October 30, 1992.

STATEMENT OF THE CASE

Spencer Gifts, Inc. ("Spencer") discharged John Olitsky in December, 1983. The 1987 trial resulted in a jury finding of willful age discrimination by Spencer. On appeal, the Fifth Circuit reversed on an evidentiary point and expressed no opinion on Olitsky's cross-appeal concerning the trial court's refusal to award liquidated damages on the award of front pay. *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 126, n.1 (5th Cir.), *cert. denied*, 488 U.S. 925 (1988).

The second jury trial resulted in a jury finding of willful discrimination by Spencer. The district court doubled the jury's back pay award of $500,000 and lost pension benefits award of $100,000 as liquidated damages. In addition, the district court found that reinstatement was not feasible and awarded $400,000 in front pay (R. 2572), but did not double this amount.

Spencer appealed the second jury verdict (and district court finding on Olitsky's ERISA claim) to the Fifth Circuit Court of Appeals. Olitsky cross-appealed again as to the issue of whether front pay is subject to doubling under the ADEA upon a finding of willful age discrimination. The Fifth Circuit affirmed the district court's judgment in favor of Olitsky but denied Olitsky's cross appeal. The Fifth Circuit noted it had not previously addressed the question, but that six other circuits ruled that front pay could not be doubled under the ADEA and that Olitsky had not persuaded it the other circuits had interpreted the statute incorrectly. Pet. App. at 18a.

REASONS FOR GRANTING THE CROSS-PETITION

The Fifth Circuit's decision that front pay is not an "amount owing" that is subject to doubling in the event of a finding of willful age discrimination under the ADEA is a decision on an important question of federal law which has not been, but should be settled by this Court.

The Court should settle this question despite the fact that there is not a split among the circuits and without awaiting a ruling by a circuit court contrary to existing circuit court rulings. First, the pattern of circuit court decisions on this issue has been to adopt the 1987 rulings of the Second and Ninth Circuits without analysis of this Court's punitive damages decision in *Transworld Airlines v. Thurston*, 469 U.S. 111 (1985), and without application of the plain wording of the ADEA. Second, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*, is in place to protect all workers and job applicants over age 39 in this country from unlawful age discrimination. This Court has expressly ruled that the liquidated damages provision of the ADEA is punitive in nature. Thus, the degree of deterrence provided by the liquidated damages provision of the ADEA is in jeopardy nationwide until and unless this Court settles this question.

The Fifth Circuit decision contained no independent reasoning. The most elaborate discussion of the issue appears in the Second Circuit's decision in *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1258-59 (2d Cir. 1987). The flaw in the Second Circuit's reasoning in *Dominic, supra*, is its failure to acknowledge the plain meaning of the words contained in the ADEA. The starting point for analysis is the clear language of the statute, and this Court's ruling in *Transworld Airlines v. Thurston*, 469 U.S. 111 (1985), that liquidated damages are punitive in nature.

The holding that front pay is not an "amount owing" subject to doubling is strange in view of the clear wording of the statute and rulings that an ADEA plaintiff

who establishes a willful violation is entitled to liquidated (double) damages as to all pecuniary losses, including wages, fringes, and other job-related benefits. *See, e.g., Blim v. Western Electric Co., Inc.*, 731 F.2d 1473, 1480 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984); *Merkel v. Scovill*, 570 F.Supp. 141 (S.D. Ohio 1983) (doubling applies to amounts the employer would contribute to reinstated employee's pension plan). All courts that have rejected liquidated damages on front pay have given the term "amounts owing" a technical meaning. Unless the statute or the legislative history says *back pay* is an amount owing that can be doubled, but *front pay* is an amount owing that cannot be doubled, it is equally unsound judicial activism for a court to declare that front pay cannot be doubled as to declare that back pay cannot be doubled. If Congress meant to make these distinctions, instead of saying "amounts owing" in the ADEA, 29 U.S.C. § 626(b), and "wages lost" (drawing no distinction between past and future wages), 29 U.S.C. § 216(b) in the Fair Labor Standards Act (FLSA), Congress would have said "all money lost before trial" or "all amounts owing but not including front pay." While Congress said nothing of the kind (nor did the legislative history), the amount of money owing to John Olitsky, if paid on the judgment date for future losses of income, was in fact $400,000 (R. 2552-53).

The Fifth Circuit and the Second Circuit's decision in *Dominic, supra*, failed to reckon the implications of this Court's decision in *Transworld Airline v. Thurston*, 469 U.S. 111 (1985), that liquidated damages are punitive. This is different from the purpose of liquidated damages under the FLSA, which are to compensate for damages that are difficult to calculate. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945). It defies logic that Congress would provide for punitive damages and simultaneously intend to (1) substantially, (2) arbitrarily, but (3) silently limit those amounts. The more egregious the age discrimination, the more likely it is that reinstatement is

not feasible and that, accordingly, a major part of the amount owing is in the form of lost future wages. Further, the amount of punitive damage liability the defendant may face under *Dominic*'s reasoning would be impossible to predict at the outset and inherently arbitrary. One case may go to trial in a year, so there is a year's back pay to double, and the other losses are front pay, while another age discrimination case may take eight years (as here) to go to trial, resulting in more back pay to double as punitive damages. Because it is illogical, we cannot presume Congress intended that the amount and availability of punitive damages be so fickle. Congress provided that liquidated damages are payable only in cases of willful violations. Employers should be on notice that ADEA remedies may include substantial punitive damages—that none of the teeth Congress placed in this Act for dealing with willful violations have been extracted by the courts.

The linchpin of the Second Circuit's reasoning in *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1258-59 (2d Cir. 1987), is its determination that "amounts owing . . . as a result of a violation of" the ADEA has a technical meaning. Per *Dominic*, "amounts owing" refers to relief that is legal in nature, while front pay is equitable in nature, and therefore cannot be doubled. This reasoning does not resolve the issue—nor does it directly address the language or the legislative history. The ADEA states:

> Amounts owing to a person as a result of a violation of this Chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 216 and 217 of this Title; *Provided*, That liquidated damages shall be payable only in cases of wilful violations of this Chapter. In any action brought to enforce this Chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter, including without limitation judg-

> ments compelling employment, reinstatement, or promotion or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b). The Fair Labor Standards Act (FLSA) states:

> Any employer who violates the provisions of Section 206 or Section 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of Section 215(a)(3) of this Title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of Section 215(a)(3) of this Title, including without limitation, employment, reinstatement, promotion, and the amount of wages lost and an additional equal amount as liquidated damages. . . . . 29 U.S.C. § 216(b).

> The district courts . . . shall have jurisdiction for cause shown, to restrain violations of Section 215 of this Title, including in the case of violations of Section 215(a)(2) of this Title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Chapter. . . . (29 U.S.C. § 217).

Under this language there is no magic to (and certainly no magic eraser in) the term "amount owing" for purposes of limitation. The FLSA provides legal and equitable remedies, including injunctive proceedings, and liquidated damages provisions are provided for both. The FLSA itself has never been interpreted to foreclose doubling front pay. FLSA suits generally involve unpaid overtime, not discharge. The Fifth Circuit in 1980 ruled that reinstatement is a proper remedy under the FLSA where an employer has fired an employee for pursuing a claim for unpaid overtime under the Act. *Reeves v. International Tel. and Tel. Corp.*, 616 F.2d 1342, 1354 (5th

Cir.), *cert. denied*, 449 U.S. 1077 (1980). *Reeves* does not suggest that front pay amounts would be off limits for doubling.

The Second Circuit makes an error of statutory interpretation, particularly in light of *Thurston*, *supra*, by reading the "amounts owing" sentence of Section 626(b) separately from the sentence that authorizes the court to grant legal or equitable relief as appropriate. This language must be read together and as a whole. As such, and particularly when the words are given their plain meaning, it is clear that if John Olitsky is owed front pay, this is an amount owing to him as a result of a violation of the ADEA. The fact that this amount was awarded by the court sitting in equity as opposed to a jury is irrelevant. The Second Circuit makes a distinction (equitable versus legal relief) without a difference as to this issue. When Congress in the ADEA talked of doubling "amounts owing"—it did not say to do so only if they were deemed owing by the jury as legal amounts owing.

The Second Circuit's reasoning in *Dominic* hints at support from the legislative history of the ADEA. The Second Circuit refers to the legislative history of § 626 (c)(2), dealing with the right to jury trial in any action for recovery of amounts owing for violations of the ADEA, "regardless of whether equitable relief is sought by any party in the action." The Second Circuit notes that the House Conference Report identifies one component of "amounts owing" as wages. The House Conference Report does not distinguish between past and future wage losses. A word-for-word review of all the legislative history (House and Senate) dealing with § 626(b) indicates that Congress never suggested that there is a distinction between back pay and front pay in connection with an employer's liability for liquidated damages in case of willful violations. This technical meaning of "amounts owing" is one of judicial interpretation and not a creature of Congress.

The five other circuits that have decided this issue have contributed no reasoning to support *Dominic*'s result. The Tenth Circuit relied expressly upon *Dominic* in *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1556 (10th Cir. 1988). *Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1163, n.2 (6th Cir. 1991) provides one sentence and no reasoning for its holding. The Third and Ninth Circuits do not offer comprehensive explanations, but reasoning that hints at judicial discomfort with punitive damages. *Blum v. Witco Chemical Corp.*, 829 F.2d 367 (3d Cir. 1987); *Cassino v. Rischold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987). The Seventh Circuit illogically holds that the front pay award due an ADEA discriminatee is not properly doubled since the liquidated damages provision applies to the "amount owing" and front pay is a "prospective remedy." *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198 (7th Cir. 1988). The fact that front pay is a prospective remedy does not mean that the amount found by the district court to be the present value of front pay lost (where reinstatement is not feasible) is not an amount owing. Indeed, this amount is *exactly* the amount owing—no more and no less.

Whether front pay is susceptible to doubling under the liquidated damages provision of 29 U.S.C. § 626(b) goes a long way toward establishing the deterrence level against willful acts of age discrimination built into the ADEA. This case illustrates the need for the full measure of deterrence built into the statute. The pressing need for the passage of the ADEA as set forth in the Congressional Statement of Findings and Purpose, 29 U.S.C. § 621(a), illustrates that the plain meaning of the Act should be enforced so the punitive damage provisions constitute a full deterrent against willful violations. When Congress intends to limit the amount of punitive damages, it does so with the plain wording of the statute, as it did in the Civil Rights Act of 1991, 42 U.S.C.

§ 1981a(b)(3), for actions under Title VII of the Civil Rights Act of 1964, as amended.

Spencer fired John D. Olitsky in 1983 in a willful violation of the ADEA. *Olitsky I*[1] reversed because the Fifth Circuit concluded that under Section 706(b) of Title VII, the trial court should not have admitted into evidence the statement by Spencer's General Counsel that "if McNally (Olitsky's younger counterpart who was not meeting Plan and who was promoted when Olitsky was fired) was promoted, we can't rebut." These words to the EEOC in 1984 were correct—this was age discrimination; Spencer could not rebut. In 1984, Spencer knew it could not rebut, yet in late 1992, Spencer still resists any relief for John Olitsky under the ADEA.

Without liquidated damages, particularly in age discrimination cases, the defense may take so long that the aging plaintiff gives up or literally dies before obtaining relief in the courts. In age cases, justice delayed may well be justice denied. A full measure of punitive damages is more likely to discourage employers from violating the ADEA and to encourage settlement of just claims. If employers guilty of willfully firing older workers because of their age are to receive relief from the express language of the law that provides for doubling the "amount owing," they should do so by the hand of Congress and not by act of the courts.

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[1] *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123 (5th Cir. 1988).

CONCLUSION

For the reasons stated herein, the Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HAL K. GILLESPIE
GILLESPIE, ROZEN & TANNER, P.C.
Brookriver Center, Suite N-703
8200 Brookriver Drive
Dallas, Texas 75247
(214) 634-0333
Attorneys for Respondent,
Cross-Petitioner John D. Olitsky

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